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Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

CHRISTOPHER SHAWN TUTER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *United States v. Leon*, 486 U.S. 897 (1984) should be overruled due, at least in part, due its reliance on deterrence of police misconduct as the sole justification for the rule, ignoring the precedential authority of was *Mapp v. Ohio*, 367 U.S. 643 (1961).

2. Whether the active participation of an attorney from the United States Attorney's Office in the preparation of an affidavit for a search warrant, when the attorney erroneously advises an affiant law enforcement officer that probable cause does, in fact exist, removes the protective cloak afforded a law enforcement officer from the "good faith" exception to the exclusionary rule due to the fact that that an attorney cannot claim the same ignorance of constitutional intricacies that the law enforcement officer can. To make matters more egregious, a number of cases addressing the same Fourth Amendment question at issue in this case had been decided, and published, by both the Tenth Circuit Court of Appeals, and should have been known to the attorney who worked with the affiant in the preparation of the search warrant affidavit.

PARTIES TO THE PROCEEDINGS

There are no parties to this proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES OF AMERICA, TENTH CIRCUIT COURT OF APPEALS

Petitioner Christopher Shawn Tuter respectfully requests that a Writ of Certiorari be issued to review the ruling of the Tenth Circuit Court of Appeals overruling an order from the Northern District of Oklahoma sustaining Petitioner's motion to suppress.

OPINIONS BELOW

Petitioner's case is presently scheduled for jury trial on July 9th, 2001, in the Northern District of Oklahoma, for nine alleged violations of federal law relating to the possession of firearms and explosive material(s). The District Court had sustained Petitioner's motion to suppress the fruits of a search of Petitioner's residence that led to the discovery of the evidence against him on April 28th, 2000, but the Tenth Circuit reversed in part in *United States v. Tuter,* 240 F.3d 1292 (10th Cir. 2001) on March 1, 2001. Petitioner Tuter filed a timely

petition for rehearing and rehearing *en banc*, both of which were denied on March 29th, 2001.

STATEMENT OF JURISDICTION

The Opinion by the Tenth Circuit Court of Appeals was decided on March 1, 2001. A timely request for a rehearing and a petition for rehearing *en banc* were filed and overruled.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 10(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Background and Proceedings Below.

On December 21, 1999, a federal magistrate judge issued a search warrant to agents of the federal Bureau of Alcohol, Tobacco and Firearms (ATF) to search the residence of

Petitioner Christopher Shawn Tuter at 4104 West Princeton Street in Broken Arrow, Oklahoma, for firearms, explosives, and related materials. The search was conducted the next morning and agents discovered sixteen firearms of various makes and models, numerous live rounds of ammunition, four assembled grenades, a readily assembled grenade, a pipe bomb, and other related explosive materials.

The search warrant was issued based upon an affidavit by ATF agent Bruce Magalassi. The affidavit was prepared with the assistance of the United States Attorney's Office. According to his affidavit, on December 20, 1999, an anonymous caller phoned WeTIP, Inc., a nationwide company that takes anonymous calls regarding crimes and passes the tips along to law enforcement agencies for further investigation. The caller reported to WeTIP that a thirty-eight year old white man named Chris Tuter, living at 4104 West Princeton Street in Broken Arrow, Oklahoma, was making pipe

bombs in his garage. The operator took down the caller's information on an intake form, and immediately called Lieutenant Paul Krouter of the Broken Arrow, Oklahoma Police Department, leaving a message on his answering machine. When Krouter heard the phone message he called Agent Magalassi and relayed the information to him.

Agent Magalassi obtained a faxed copy of the WeTIP operator's intake form. It stated:

> SUSPECT MAKES PIPE BOMBS IN HIS GARAGE/ SUSPECT ALSO HAS 2-3 WEAPONS IN HIS HOME/ SUSPECT HAS ONE SON/IAN TUTER AGE 12 LIVING IN THE HOME/ ATTENDS UNION ELEMENTARY OR MIDDLE SCHOOL/ SON HAS BEEN KNOWN TO SHOW WEAPONS TO SCHOOL FRIENDS WHEN THEY COME OVER TO SUSPECT[']S HOME

The intake form described the kind of weapons Tuter possessed as "RIFLE/AKA," *id.*, and stated Tuter owned a gold colored 1997 Jeep Cherokee. The intake sheet also stated the caller's information was "FIRSTHAND," *id.*, but

no explanation was given as to how the caller came to have this information.

Agent Magalassi began an investigation and attempted to corroborate the information provided by the anonymous caller. He verified that a thirty-eight year old white male named Christopher Tuter lived at 4101 West Princeton Street in Broken Arrow, Oklahoma, with his thirty-seven year old wife, Cecily Tuter, and his twelve-year old son Ian. He verified that Cecily Tuter owned a 1997 Jeep Cherokee. He also investigated defendant Chris Tuter's criminal history and learned that Tuter had a 1983 burglary conviction, a 1984 burglary conviction, a 1984 conviction for knowingly concealing stolen property, a 1984 arrest for auto theft and possession of marijuana, and a 1984 arrest for possession of a firearm after a felony conviction. Finally, he learned that the Tuters had reported the theft of a vehicle in 1998, and that two firearms were inside the car at the time of the theft.

Agent Magalassi's affidavit contained several errors and inconsistencies. His affidavit gave an incorrect social security number for Petitioner Tuter, and misspelled Tuter's name twice. The affidavit stated that the anonymous caller reported that Tuter's son attended a Broken Arrow school. In fact, the caller had correctly reported that the son attended Union elementary or middle school. Agent Magalassi's affidavit also stated the caller reported Tuter as having an "AKA rifle, though Agent Magalassi later conceded that no such weapon exists. Although Agent Magalassi's affidavit stated that public records indicated the Tuters had lived at the Princeton Street address since 1988, Tuter testified he has only lived there since 1995. Tuter also testified that the 1998 vehicle theft report was filed only by Cecily Tuter, his wife, not by the couple, as stated in the affidavit. Further, based on a description from the Broken Arrow police department, Agent Maglassi described Tuter's Jeep Cherokee in his

affidavit as mocha-colored, whereas the anonymous caller described it as gold-colored.

Tuter moved to suppress the evidence discovered at his residence, claiming the warrant's supporting affidavit contained materially false statements and failed to establish probable cause, that the warrant was overly broad, and that the search was executed in an unreasonable manner. After a hearing, the district court found that the errors in the affidavit were insubstantial. However, it suppressed the evidence on the basis that the supporting affidavit did not establish probable cause to justify the issuance of the search warrant.

The Government appealed the trial court's decision to the Tenth Circuit Court of Appeals. On March 1, 2001, the Tenth Circuit reversed the District Court. While agreeing that the affidavit in support of the search warrant lacked probable cause, the Tenth Circuit concluded that the officer serving the warrant

acted in good faith, thus rendering the warrant sufficient for the purpose of admitting evidence against Christopher Tuter at trial. Petitioner requested a rehearing and a rehearing *en banc* before the Tenth Circuit, both of which were denied.

Mr. Tuter's case was originally set for jury trial on May 7th, 2001, but a "Motion to Stay or Motion to Continue Scheduling" was granted in the Northern District of Oklahoma on April 27th, 2001. While the trial has now been reset until July 9th, 2001, it is believed that this case has essentially been stayed pending a decision by this Court whether to accept certiorari review.

REASONS FOR GRANTING WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE TENTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE REVIEWED BY THIS COURT.

DOES *UNITED STATES V. LEON* VIOLATE THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND IGNORE VALID

PRECEDENT IN ITS MYOPIC FOCUS ON THE DETERRENCE RATIONAL OF THE EXCLUSIONARY RULE.

> *The "good faith" exception to the Exclusionary Rule is an intolerable insult to the Fourth Amendment to the United States Constitution.*

Recognizing that this argument is contrary to existing law, Petitioner nonetheless submits this argument in opposition to said law, in a *bona fide* attempt to overturn and/or alter the same.

United States v. Leon, 486 U.S. 897 (1984), was ill-reasoned – founded upon a faulty premise – that being that the Exclusionary Rule is *not inherent* in the Fourth Amendment and that its sole *raison d'ëtre* is ***deterrence***. A considered analysis of the history of the Exclusionary Rule shows its underpinnings to extend significantly beyond mere ***deterrence***.

History of the Exclusionary Rule

One of the abuses of the British Crown which fueled the American Revolution was the unconstrained power of the Crown to search the homes, business, private papers and effects of

the people, which was often used as a means of stifling freedom of the press. The omission of a Bill of Rights, including protections against unreasonable search and seizure, from the draft Constitution proposed by the Constitutional Convention meeting in Philadelphia in 1787, generated considerable opposition to ratification of the Constitution. Because of this widespread criticism, President Washington urged the addition of a Bill of Rights and James Madison assumed the role of sponsor of the Fourth Amendment. LaFave, *Search and Seizure*, West Pub. Co. 1978, 1995, Sec. 1.1(a).

In 1886, the U.S. Supreme Court rendered its decision in *Boyd v. U.S.*, 116 U.S. 616 (1886), characterized by the Court itself as "the leading case on the subject of search and seizure." See, *e.g.*, *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965); *Carroll v. U.S.*, 267 U.S. 132 (1925). Justice Bradley found that the Fourth Amendment's prohibition against unreasonable searches and seizures was inextricably linked to the Fifth

Amendment's protection against self-incrimination. Justice Bradey concluded, accordingly, that an order for the Boyds to produce an invoice was tantamount to an order to give up self-incriminating evidence, which would have been unconstitutional and therefore void, so that the admission of the invoice in evidence was held to be equally erroneous. Thus, the birth of a rule to exclude illegally obtained evidence is found in a situation in which *deterrence* was not even a relevant consideration.

Then, in 1914, the Supreme Court decided *Weeks v. U.S.*, 232 U.S. 383 (1914), in which government agents illegally seized private papers belonging to the defendant Weeks. The Supreme Court held that the Fourth Amendment *required* the return of these papers. Beyond this, the Court held that, since the papers should have been immediately returned to Weeks, they would have been unavailable for use by the government at trial. Therefore, the Court found that the *use* of the illegally seized

papers at trial was itself a violation of the Fourth Amendment.[1]

The next step in the evolution of the exclusionary rule was *Mapp v. Ohio*, 367 U.S. 643 (1961). In *Mapp*, Cleveland police officers searched Dollree Mapp's home without a warrant and found evidence which was used to convict her in a state court prosecution. The *Mapp* Court made the Exclusionary Rule, as recognized in *Weeks*, *obligatory* upon the states. Speaking for the Court, Justice Clark enumerated several justifications for concluding that ***due process*** *requires* that evidence obtained through an unreasonable search be excluded from use at trial. First, Justice Clark quoted extensively from the Court's observation in *Boyd v. United States*, 116 U.S. 616 (1886), that the Fourth and Fifth Amendments run "almost into each other." *Mapp*, 367 U.S. at 630 (quoting *Boyd*, 116 U.S. at 630).

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[1] This strongly suggests a prevailing view (at that time at least) that an exclusionary rule was ***inherent*** in the Fourth Amendment.

Justice Clark then described a second justification for considering the exclusionary rule, "basic to due process." Justice Clark observed, "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, ***might as well be stricken from the Constitution.***" (emphasis added). These words echo the sentiment expressed by Chief Justice John Marshall in his famous statement in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury*, at 163.

Justice Clark then articulated a third justification for the exclusionary rule, which is interrelated with the second justification. "But,

as was said in *Elkins*, 'there is another consideration – the imperative of *judicial integrity.*'" (emphasis added) Justice Clark explained: "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." Justice Clark also stated that admitting improperly seized evidence at trial was an "ignoble shortcut to conviction left open to the State" which "tends to destroy the entire system of constitutional restraints on which the liberties of the people rest."

Justice Clark also discussed, but only *briefly*, a fourth justification for the exclusionary rule, that being *deterrence*. *Mapp*, at 648. At one point he characterized the exclusionary rule as a "clear, specific, and ***constitutionally required*** – even if judicially implied – deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to ***'a form of words.'***" (emphasis added) At another point, Justice Clark quoted briefly from *Elkins v. United States*, 364 U.S. 206 (1960), in

which the purpose of the exclusionary rule was said to be "to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it."

At the conclusion of his opinion for the Court in *Mapp*, Justice Clark summarized the Court's decision. His summary is interesting in two regards: first, it does not even *mention* the *deterrence* justification; second, it suggests even a fifth justification for the exclusionary rule: restoration of the *status quo, ante*. "Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled and, to the courts, that judicial integrity so necessary in the true administration of justice." *Mapp*, 367 U.S., at 660 (quoting *Elkins*, 364 U.S., at 217). By these words, Justice Clark declares that *the exclusionary rule is designed and intended to put the individual in the position he would have been*

in had his rights been respected – neither better nor worse.

The Flaw in Regarding the Deterrence Rationale as Sole Justification for the Exclusionary Rule

While the Supreme Court in *Mapp* devoted little attention to *deterrence* as a justification for the exclusionary rule, the Court's decisions following *Mapp*, beginning with *Linkletter v. Walker*, 381 U.S. 618 (1965), assigned an ever-increasing significance to *deterrence*, pushing the primary justifications advanced by Justice Clark, in Mapp, into the background. In *Linkletter*, the Court held that *Mapp* would not be applied retrospectively. In *United States v. Calandra*, 414 U.S. 338 (1974), Justice Powell, speaking for the Court, stated that "[t]he purpose of the exclusionary rule *is not to redress* the injury to the privacy of the victim of an illegal search.[2] Instead, the rule's

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[2] This conflicts directly with the *ratio decedendae* of both *Marbury v. Madison* and *Mapp v. Ohio* – that a right without a remedy is no right at all, merely a "form of words."

prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment..." The *Calandra* majority paid no attention to the justifications discussed in *Mapp*. Indeed, *Mapp* was merely cited and not even discussed. In considering the justification for exclusion, Justice Powell relied almost entirely on the earlier decision in *Elkins*. The three prime cornerstones of the Exclusionary Rule were effectively redacted from the history books, paving the way for the use of illegally obtained evidence.

In *United States v. Leon*, 468 U.S. 897 (1984), the Court focused on the ***deterrence*** rationale, and nothing else. The Court held that evidence need not be suppressed when police obtain the evidence through objective "good faith" reliance on a facially valid warrant which is later found to lack probable cause or be otherwise defective. The idea was, simply, that if the police were acting in good faith, the exclusion of evidence would not ***deter*** them from acting in the same manner the next time

that a warrant was sought. The Supreme Court then identified four situations where police reliance on a warrant would not be objectively reasonable: (1) when the magistrate issued the warrant in reliance on a deliberately or recklessly false affidavit; (2) when the magistrate failed to act in a neutral and detached manner; (3) when the warrant was based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;" or (4) when the warrant was so facially deficient that an officer could not reasonably have believed it to be valid.

The *Leon* Court cautioned, however, that an officer cannot obtain a warrant on the basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search. *Leon*, at 923 n.24. See *United States v. Ricciardelli*, 998 F.2d

8 (1st Cir. 1993), at 15-16.[3] (reliance unreasonable when defects on warrant's face apparent enough that officers should have realized that it was not valid); *United States v. George*, 975 F.2d 72 (2nd Cir. 1992), at 77 – 78. (reliance unreasonable when the warrant provided broad authorization to search for "any other evidence relating to the commission of a crime").

Leon *is Unsound*

The undersigned attorney respectfully submits that the exception carved out of the Exclusionary Rule by the Supreme Court in ***Leon*** is just plainly and simply ***wrong***. If, perhaps, there was nothing more to the Exclusionary Rule than ***deterrence***, and all of

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[3] The *Ricciardelli* court pointed out that "[a]lthough weakening the exclusionary rule, the [Supreme] Court [in *Leon*] did not defenestrate it. The Justices acknowledged that suppression would continue to be appropriate in situations where, notwithstanding the issuance of a warrant, 'the law enforcement officer had knowledge, *or may properly be charged with knowledge*, that the search was unconstitutional under the Fourth Amendment.'" *Leon* at 919, 104 S.Ct. at 3419 (emphasis added).

the compelling, if not *irresistible*, logic of Justice Clark in *Mapp v. Ohio, supra*, were for naught, then perhaps ...only *perhaps* ...rational support for withholding the Exclusionary Rule might be found. However, there is just no getting around Justice Clark's analysis. The Exclusionary Rule is ***inherent*** in the Fourth Amendment. It is, Justice Clark told us, "basic to due process." In fact, according to Justice Clark, the Exclusionary Rule is the *sine qua non* of the Fourth Amendment and, without it, the Fourth Amendment, " ...might as well be stricken from the Constitution." Further, the Fourth Amendment is inextricably tied to the Fifth, which prevents a person from being required to give up incriminating evidence against himself verbally, and the Fourth Amendment seeks to achieve the same protection, but with respect to searches and seizures. The third cornerstone for the Exclusionary Rule articulated by Justice Clark was simply that of ***judicial integrity***. As Justice Clark stated, " nothing can destroy a government more quickly than its failure to

observe its own laws, or worse, its disregard of the charter of its own existence."

Far wiser and far more articulate legal scholars than this humble lawyer have published their analyses and critiques of *Leon*.[4] Suffice it to say that this attorney sides with Justice Clark and professes the viability of the interplay between the Fourth and Fifth Amendments, the inherent necessity of an Exclusionary Rule to give viability to the Fourth Amendment and the preservation of judicial integrity. Furthermore, the fifth justification mentioned in Justice Clark's synopsis, restoration of the *status quo, ante,* merely

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[4] See, *e.g.*, Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest On a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 Creighton L.Rev. 565 (1983); Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 Geo. L.J. 365 (1981); Bradley, *The "Good Faith Exception" Cases: Reasonable Exercises in Futility*, 60 Ind. L.J. 287 (1985); Kamisar, *Gates, "Probable Cause," "Good Faith," and Beyond*, 69 Iowa L.Rev. 551 (1984); Dripps, *Living with Leon*, 95 Yale L.J. 906 (1986); Baldwin, *Due Process and the Exclusionary Rule: Integrity and Justification*, 39 Fla. L.Rev. 505 (1987).

reflects how the Exclusionary Rule fulfills the stated mission, the very *raison d'ētre,* of our entire legal system*: making the things the way they should have been all along.*

Lastly, the doctrine of *stare decisis* describes the obligation owed by our legal system to be ***consistent***, and to decide like issues under like circumstances in a like manner. But what, then, of the objectivity versus subjectivity debate, within the context of traffic stops. Remember "pretext" stops? That was when a trooper would stop a black or Mexican person on interstate, for some trivial (or fabricated) traffic violation, to conduct a drug investigation, based solely on the color of the motorist's skin. Courts originally condemned pretext stops as a subterfuge, contrived by the Trooper to pry into the privacy of an individual, without having probable cause to do so. Then, in *Scott v. United States*, 436 U.S. 128 (1978), the Supreme Court held that police searches are to be tested "under a standard of *objective* reasonableness, without

regard to the underlying intent or motivation of the officers involved."

Now, how on earth can one reconcile *Scott* with *Leon*? If the police can stop a black motorist on an interstate highway for a trivial traffic offense, in order to conduct a drug investigation, under the "objective standard" test, should we not, then, similarly apply the Exclusionary Rule *objectively* in all cases, without regard to the subjective "good faith" of the officers? If the legality of a traffic stop is to be assessed objectively only, *stare decisis* should require us to assess the applicability of the Exclusionary Rule equally, in the case of *every* defective warrant, without regard to the state of mind of the officer serving it.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE TENTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION WHICH HAS NOT, BUT SHOULD BE DECIDED BY THIS COURT.

DOES THE GOOD FAITH EXCEPTION OF *UNITED STATES V. LEON* APPLY WHEN THE

UNITED STATES ATTORNEY'S OFFICE HAS ASSISTED IN THE PREPARATION OF AN AFFIDAVIT FOR A SEARCH WARRANT WHICH LACKS PROBABLE CAUSE.

During the District Court hearing on Petitioner's motion to suppress, the trial judge questioned Agent Magalassi:

A. In all honesty, Your Honor, I was depending on all of it somewhat equally. Depending on the corroborative information in the tip. *And I reviewed the information with the U.S. Attorney's Office to make sure that we had probable cause, or that I was not thinking –*

Q. (The Court) You contacted the U.S. Attorney's office?

A. Yes, sir.

Q. And they said you had probable cause?

A. They agreed to prepare an affidavid. [sic]

Q. I didn't ask you what you agreed to do. I asked you if they told you [that] you had probable cause.

A. Yes, sir, that we had probable cause. *I felt I did.*

Petitioner is asking this Court to focus upon the agent's assertion that the United States Attorney's Office agreed to prepare an

affidavit. The affidavit, then, was *not* prepared by a law enforcement officer who cannot be expected to appreciate "constitutional intricacies." An attorney specializing in criminal law from the United States Attorney's office either prepared the affidavit or, at a minimum, assisted in the preparation of the affidavit. The language of *United States v. Cardall,* 773 F.3d 1128, 1133 (10th Cir. 1985), cited in the Tenth Circuit's Opinion, *Tuter,* 240 F.3d at 1300, does not have application to the facts of this case. (*Cardall* states that in considering the *Leon* good-faith principles, "it must ...be remembered that the knowledge and understanding of law enforcement officers and their appreciation for constitutional intricacies are not to be judged by the standards applicable to lawyers..."). If a law enforcement officer seeks the advice of a lawyer (already a clue that he has serious questions as to the sufficiency of probable cause), and an Assistant United States Attorney proceeds to prepare an affidavit on the officer's behalf, why,

then, should not the determinations of the magistrate and the A.U.S.A. be held to the standards of a lawyer?

To hold otherwise creates an impossible situation. While Petitioner in no way intends to argue that a police officer should not seek the advice of an attorney in the preparation of an affidavit, he does argue that once he has done so, the *Leon* "cloak of ignorance" must be lifted. Otherwise, the United States Attorney from whom advice is requested would, inevitably, err towards the sufficiency of probable cause when he offers his advice. Why tell the affiant officer anything else? If he tells the officer that probable cause exists, the "good faith" of the officer is virtually insured. To tell the officer that probable cause does *not* exist would unquestionably deny the officer the *Leon* "good faith" argument should the magistrate issue a warrant lacking probable cause. To subject the affiant officer who has sought legal advice and assistance from a U.S. Attorney to the standard

of an attorney would encourage objectivity from the United States or District Attorney. If counsel felt that probable cause was lacking or weak, he might suggest additional effort in the preparation of a revised affidavit. ***This would ultimately provided additional protection to the public, as fewer warrants lacking probable cause would issue.***

The Tenth Circuit placed a great deal of emphasis on the fact that after Agent Magalassi prepared his affidavit and the magistrate judge issued a search warrant this Court decided *Florida v. J.L.*, 529 U.S. 266 (2000). The District Court Judge cited the *J.L.* decision in its order sustaining Petitioner's motion to suppress.

In *Florida v. J.L.*, an anonymous caller reported to the police that a young black male wearing a plaid shirt was standing at a particular bus stop and carrying a gun. Police verified that the caller had accurately described the man's location and appearance, and conducted an investigatory stop. This Court

ruled that the caller's information was inadequate even to satisfy the reasonable suspicion standard necessary for an investigatory stop, much less probable cause to conduct a search or issue a warrant. This Court noted that if an anonymous tip provides "predictive information" about "future movements" that officers can corroborate, then officers *might* have reasonable suspicion. This Court cited its 1990 decision of *Alabama v. White,* 496 U.S. 325 (1990), a case involving such prediction of future activity – at least enough to justify "reasonable suspicion." The Supreme Court has held that the level of reasonable suspicion required for a *Terry* stop is "obviously less demanding than for probable cause." *Illinois v. Gates,* 462 U.S. 213 (1983) Probable cause means "a fair probability that contraband or evidence of a crime will be found." *Gates,* 462 U.S. at 238. The *White* decision clearly states:

> We think it also important, as in *Gates*, 'the anonymous[tip] contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily no easily predicted.' The fact that the officers found a car precisely matching the caller's description in front of the 235 building is an example of the former. Anyone could have 'predicted' the fact because it was a condition presumably existing at the time of the call. *Alabama v. White*, 496 U.S. at 332.

Therefore, it would seem, that the law articulated in the *J.L.* decision was nothing new. This is further evidenced by the fact that it was a *unanimous* decision of this Court. The Supreme Court's recent publication of a decision on the subject of anonymous tips does not make the point of law necessarily "new." In fact, in 1989, the Tenth Circuit Court of Appeals decided *United States v. Bishop*, 890 F.2d 212 (10th Cir. 1989), in which an anonymous tipster demonstrated no special knowledge of the crime, had not previously proven himself

reliable and did not predict any future activity of the defendant, *the very same situation as presented here*. After finding the *Bishop* affidavit deficient in this manner, however, the Court went on to apply *Leon*.[5] The outcome of *Bishop* was that, under *Leon*, an officer's reliance on an informant of unproven reliability would not preclude his "good faith" reliance on the warrant. So, for the last twelve years or so, readers of the law in the Tenth Circuit knew, or should have known, that an informant's reliability is essential to a valid search warrant affidavit. Or, more to the point of the question presented for this Court, a lawyer, practicing in the United States Attorney's office for the Northern District of Oklahoma who felt knowledgeable enough in Fourth Amendment

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[5] Yet again in 1996, in *United States v. McNeeley*, 6 F.3d 1447 (10th Cir. 1996), *Bishop* was cited and, once again, a deficient affidavit was, as the Tenth Circuit put it, "trumped" by *Leon*, although the Tenth Circuit did note that an officer who knew or should nave known that

search and seizure law to assist an officer in the preparation of an affidavit, should have known the law.

So ...the question presents itself – just how many plays of the "good faith" trump card is the government to be allowed? At what point are we going to expect these people to know and follow the law? Should an Assistant United States Attorney be permitted to bask in the same blissful "good faith" of ignorance that a police office affiant can? With *Bishop and White* on the books for over a decade, can officers, to say nothing of federal prosecutors, still claim to be ignorant of the law? Finally, this Court is asked to consider the irony of holding our officers and magistrates to a lower standard than we demand of common criminals, whom we admonish that : "Ignorance of the law is no excuse."

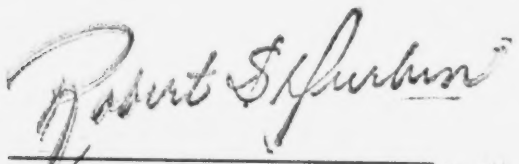
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the warrant was invalid *may not rely on the good faith exception.*

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Robert S. Durbin, do hereby certify that on the 21 day of June, 2001, that a true and correct copy of the above and foregoing document was mailed, with proper postage thereon fully prepaid, to:

Assistant United States Attorney Lucy Roberts
3460 U.S. Courthouse
333 West Fourth St.
Tulsa, OK 74103

The Solicitor General
United States Department of Justice
Room 5614
Washington, D.C. 20543

Robert S. Durbin

240 F.3d 1292
2001 Daily Journal D.A.R. 1084
(Cite as: 240 F.3d 1292)

United States Court of Appeals,
Tenth Circuit.

UNITED STATES of America, Plaintiff-Appellant,
v.
Christopher Shawn TUTER, Defendant-Appellee.

No. 00-5086.

March 1, 2001.

Defendant being tried on weapons charges moved to suppress evidence discovered during search of his residence. The United States District Court for the Northern District of Oklahoma, Dale H. Cook, J., granted defendant's motion, and government appealed. The Court of Appeals, Ebel, Circuit Judge, held that: (1) anonymous tip lacked sufficient indicia of reliability to establish probable cause for search warrant, and (2) officers acted in good faith in relying on magistrate judge's authorization to search defendant's residence.

Affirmed in part, and reversed and remanded in part.

West Headnotes

[1] **Searches and Seizures** 113.1
349k113.1 Most Cited Cases

Magistrate judge's task in determining whether probable cause exists to support a search warrant is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. U.S.C.A. Const.Amend. 4.

[2] **Criminal Law** 1139
110k1139 Most Cited Cases

[2] **Criminal Law** 1158(2)
110k1158(2)

Court of Appeals reviews the district court's determination of probable cause for a search warrant de novo, while reviewing its findings

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of historical fact regarding the search for clear error. U.S.C.A. Const.Amend. 4.

[3] **Searches and Seizures** ⚿**118**
349k118 Most Cited Cases

Anonymous tip stating that defendant was making pipe bombs in his garage lacked sufficient indicia of reliability to establish probable cause for a warrant to search defendant's residence; officer's minimal corroboration of innocent, readily observable facts was insufficient to establish the veracity or reliability of the caller or to link defendant with the allegation that he was making pipe bombs in his garage. U.S.C.A. Const.Amend. 4.

[4] **Criminal Law** ⚿**394.4(6)**
110k394.4(6) Most Cited Cases

Officers acted in good faith in relying on magistrate judge's authorization to search defendant's residence, and therefore, evidence seized during search was not subject to suppression; although supporting affidavit did not establish probable cause, it was not so facially insufficient under the state of the law at the time officer obtained the warrant that officershould have known that search was illegal despite the magistrate's authorization. U.S.C.A. Const.Amend. 4.

[5] **Criminal Law** ⚿**1139**
110k1139 Most Cited Cases

Applicability of *Leon* good faith exception, under which evidence obtained pursuant to search warrant should not be excluded where officers executed warrant with objectively reasonable reliance on issuing judge's determination of probable cause, is a question of law that is reviewed de novo. U.S.C.A. Const.Amend. 4.

***1293** Submitted on the briefs: Stephen C. Lewis, United States Attorney, Lucy O. Creekmore, Assistant United States Attorney, Tulsa, OK, for Plaintiff-Appellant.

Robert S. Durbin, Tulsa, OK, for Defendant-Appellee.

Before EBEL, KELLY, and LUCERO, Circuit Judges.

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240 F.3d 1292
2001 Daily Journal D.A.R. 1084
(Cite as: 240 F.3d 1292)

EBEL, Circuit Judge.

The government appeals the district court's suppression of evidence discovered during a search of defendant Christopher Tuter's residence executed pursuant to a search warrant. Although we affirm the district court's conclusion that the search warrant was not supported by probable cause, we reverse its determination that the good-faith exception to the exclusionary rule does not apply. [FN1]

FN1. After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R.App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

BACKGROUND

On December 21, 1999, a federal magistrate judge issued a search warrant to agents of the federal Bureau of Alcohol, Tobacco and Firearms (ATF) to search the residence of defendant Tuter at 4104 West Princeton Street in Broken Arrow, Oklahoma, for firearms, explosives, and related materials. The search was conducted the next morning and agents discovered sixteen firearms of various makes and models, numerous live rounds of ammunition, four assembled grenades, a readily assembled ***1294** grenade, a pipe bomb, and other related explosive materials.

The search warrant was issued based upon an affidavit by ATF agent Bruce Magalassi. According to his affidavit, on December 20, 1999, an anonymous caller phoned WeTIP, Inc., a nationwide company that takes anonymous calls regarding crimes and passes the tips along to law enforcement agencies for further investigation. The caller reported to WeTIP that a thirty-eight year old white man named Chris Tuter,

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living at 4104 West Princeton Street in Broken Arrow, Oklahoma, was making pipe bombs in his garage. The operator took down the caller's information on an intake form, and immediately called Lieutenant Paul Krouter of the Broken Arrow, Oklahoma Police Department, leaving a message on his answering machine. When Krouter heard the phone message he called Agent Magalassi and relayed the information to him.

Agent Magalassi obtained a faxed copy of the WeTIP operator's intake form. It stated:

> SUSPECT MAKES PIPE BOMBS IN HIS GARAGE/ SUSPECT ALSO HAS 2-3 WEAPONS IN HIS HOME/ SUSPECT HAS ONE SON/IAN TUTER AGE 12 LIVING IN THE HOME/ ATTENDS UNION ELEMENTARY OR MIDDLE SCHOOL/ SON HAS BEEN KNOWN TO SHOW WEAPONS TO SCHOOL FRIENDS WHEN THEY COME OVER TO SUSPECT[']S HOME

Appellant's App. at 88. The intake form described the kind of weapons Tuter possessed as "RIFLE/AKA," *id.*, and stated Tuter owned a gold colored 1997 Jeep Cherokee. The intake sheet also stated the caller's information was "FIRSTHAND," *id.*, but no explanation was given as to how the caller came to have this information.

Agent Magalassi began an investigation and attempted to corroborate the information provided by the anonymous caller. He verified that a thirty-eight year old white male named Christopher Tuter lived at 4101 West Princeton Street in Broken Arrow, Oklahoma, with his thirty-seven year old wife, Cecily Tuter, and his twelve-year old son Ian. He verified that Cecily Tuter owned a 1997 Jeep Cherokee. He also investigated defendant Tuter's criminal history and learned that Tuter had a 1983 burglary conviction, a 1984 burglary conviction, a 1984 conviction for knowingly concealing stolen property, a 1984 arrest for auto theft and possession of marijuana, and a 1984 arrest for possession

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of a firearm after a felony conviction. Finally, he learned that the Tuters had reported the theft of a vehicle in 1998, and that two firearms were inside the car at the time of the theft.

Agent Magalassi's affidavit contained several errors and inconsistencies. His affidavit gave an incorrect social security number for defendant Tuter, and misspelled Tuter's name twice. The affidavit stated that the anonymous caller reported that Tuter's son attended a Broken Arrow school. In fact, the caller had correctly reported that the son attended Union elementary or middle school. Agent Magalassi's affidavit also stated the caller reported Tuter as having an "AKA rifle," Appellant's App. at 31, though Agent Magalassi later conceded that no such weapon exists. The intake form, however, actually described the weapons possessed by Tuter as "RIFLE/AKA," which could refer to two different weapons, rather than just one. Although Agent Magalassi's affidavit stated that public records indicated the Tuters had lived at the Princeton Street address since 1988, Tuter testified he has only lived there since 1995. Tuter also testified that the 1998 vehicle theft report was filed only by Cecily Tuter, his wife, not by the couple, as stated in the affidavit. Further, based on a description from the Broken Arrow police department, Agent Maglassi described Tuter's Jeep Cherokee in his affidavit as mocha-colored, whereas the anonymous caller described it as gold-colored.

*1295 Tuter moved to suppress the evidence discovered at his residence, claiming the warrant's supporting affidavit contained materially false statements and failed to establish probable cause, that the warrant was overly broad, and that the search was executed in an unreasonable manner. After a hearing, the district court found that the errors in the affidavit were insubstantial. However, it suppressed the evidence on the basis that the supporting affidavit did not establish probable cause to justify the issuance of the search warrant. Applying a recent decision of the

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Supreme Court, *Florida v. J.L.*, 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000), the court ruled that the supporting affidavit was insufficient to establish probable cause because Agent Magalassi failed to corroborate any of the anonymous tipster's allegations of criminal wrongdoing. The court also rejected the application of a good faith exception to the exclusionary rule because the affidavit was insufficient to justify the issuance of the warrant.

DISCUSSION

I. PROBABLE CAUSE

A. Standards of Review

[1][2] A magistrate judge's task in determining whether probable cause exists to support a search warrant "is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). We have stated that a magistrate judge's decision to issue a warrant is "entitled to 'great deference' " from the reviewing court. *United States v. Le*, 173 F.3d 1258, 1265 (10th Cir.1999) (quoting *United States v. Wittgenstein*, 163 F.3d 1164, 1172 (10th Cir.1998)). Accordingly, we need only ask whether, under the totality of the circumstances presented in the affidavit, the magistrate judge had a " 'substantial basis' " for determining that probable cause existed. *Id.*; *see also Gates*, 462 U.S. at 238-39, 103 S.Ct. 2317. We review de novo the district court's determination of probable cause, *Ornelas v. United States*, 517 U.S. 690, 697, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996), while reviewing its findings of historical fact for clear error, *United States v. Barron-Cabrera*, 119 F.3d 1454, 1457 (10th Cir.1997).

B. Anonymous Informants

The Supreme Court has adopted a "totality of the circumstances" test to determine when information from a confidential informant

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or an anonymous tip can establish probable cause. *Gates*, 462 U.S. at 238, 103 S.Ct. 2317. The Court has explained that an informant's " 'veracity,' 'reliability,' and 'basis of knowledge' are all highly relevant in determining the value of his report." *Id.* at 230, 103 S.Ct. 2317. In *Gates*, the information came from an anonymous letter which provided no indication of the informant's veracity, reliability, or basis of knowledge. The Court held that the anonymous tip, standing alone, was insufficient to establish probable cause. *Id.* at 227, 103 S.Ct. 2317. However, it explained that "a deficiency in one [factor] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Id.* at 233, 103 S.Ct. 2317. The Court found that the anonymous tip in *Gates* was sufficient to establish probable cause because it "contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties not easily predicted." *Id.* at 245, 103 S.Ct. 2317.

In *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), the Court addressed the standard for determining when an anonymous tip can provide "reasonable suspicion" to justify an ***1296** investigatory stop. [FN2] The Court recognized that "there are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.' " *J.L.*, 529 U.S. at 270, 120 S.Ct. 1375 (quoting *White*, 496 U.S. at 327, 110 S.Ct. 2412). In *White*, the Court deemed an anonymous tip sufficiently reliable to justify an investigatory stop because it was highly detailed and police independently corroborated the informant's predictions regarding the suspect's future activity. *Id.* at 332, 110 S.Ct. 2412. It reasoned that the caller's ability to predict the suspect's future activity "demonstrated inside information--a special familiarity with [the suspect's] affairs." *Id.* The Court explained that when

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"an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity." *Id.* at 331, 110 S.Ct. 2412.

> FN2. Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. *White*, 496 U.S. at 330, 110 S.Ct. 2412.

After Agent Magalassi prepared his affidavit and the magistrate judge issued the search warrant in this case, but before the district court ruled on Tuter's motion to suppress the evidence, the Supreme Court decided *J.L.*, 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254. In that case, an anonymous caller reported to the police that a young black male wearing a plaid shirt was standing at a particular bus stop and carrying a gun. Police verified that the caller had accurately described the man's location and appearance, and conducted an investigatory stop. The Court ruled the caller's information was inadequate to justify the stop, holding that reasonable suspicion "requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Id.* at 272, 120 S.Ct. 1375. The Court noted that if an anonymous tip provides "predictive information" about "future movements" that officers can corroborate, then officers might have reasonable suspicion, as was found in the "close case" of *White*. *Id.* at 271, 120 S.Ct. 1375. The Court concluded that the tip in *J.L.*, however, "lacked the moderate indicia of reliability present in *White* " because it "provided no predictive information and

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therefore left the police without means to test the informant's knowledge or credibility." *Id.* The Court ruled that police cannot rely upon "the bare report of an unknown, unaccountable informant who neither explained how he knew about the [alleged criminal activity] nor supplied any basis for believing he had inside information about [the suspect]." *Id.* The Court rejected the argument that "the tip was reliable because its description of the suspect's visual attributes proved accurate" because "[s]uch a tip ... does not show that the tipster has knowledge of concealed criminal activity." *Id.* at 271, 272, 120 S.Ct. 1375.

More recently, in *United States v. Danhauer*, 229 F.3d 1002 (10th Cir.2000), we addressed an affidavit similar to the one at issue here. In *Danhauer*, a police officer received information from another officer about a confidential informant's report that Robbi and Dennis Danhauer were cooking methamphetamine in a garage located on their property, and that a person named "Casey" was acting as a lookout in front of their home. *Id.* at 1004. The first officer did not reveal the identity of the confidential informant to the investigating officer. *Id.* The investigating officer independently corroborated that the Danhauers lived at the home identified by the informant, and observed Robbi Danhauer going back and forth between the home and the garage. *Id.* He also learned that both the Danhauers had recent criminal histories involving drugs and outstanding ***1297** arrest warrants, and that the day before, Robbi Danhauer had tested positive for methamphetamine and opiates in a probation report. *Id.* The investigating officer prepared an affidavit based on this information.

We held that this affidavit was insufficient to establish probable cause because "the affiant neither established the veracity of the informant, nor obtained sufficient independent corroboration of the informant's information." *Id.* at 1006. The affidavit did "not reveal ... the informant's basis of knowledge or adequately verify the informant's most serious

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allegation, that the Danhauers were manufacturing methamphetamine." *Id.* We held that the police failed to link methamphetamine to the Danhauers' residence. *Id.*

C. Analysis

In this case, the anonymous caller's identity was unknown, so Agent Magalassi had no information about the veracity or historical reliability of the caller. Thus, as in *Gates* and *White*, the anonymous tip standing alone "provides virtually nothing from which one might conclude that [the caller] is either honest or his information reliable." *White*, 496 U.S. at 329, 110 S.Ct. 2412 (alterations in original) (quoting *Gates*, 462 U.S. at 227, 103 S.Ct. 2317).

"When there is sufficient independent corroboration of an informant's information, there is no need to establish the veracity of the informant." *Danhauer*, 229 F.3d at 1006. However, corroboration of non-predictive information only cannot be used to confirm the reliability of an anonymous informant for the purpose of establishing even the less demanding standard of reasonable suspicion of criminal activity. *J.L.*, 529 U.S. at 271, 120 S.Ct. 1375. Here, as in *J.L.*, none of the caller's information was predictive; that is, the caller did not provide any details regarding the future behavior or actions of Tuter. Thus, "[t]he anonymous call ... left the police without means to test the informant's knowledge or credibility." *Id.*

[3] The government contends that Agent Magalassi's independent investigation corroborated the information provided by the tipster, citing in particular the fact that Agent Magalassi learned that Tuter had a past criminal history, that his wife's vehicle contained firearms as recently as a year ago, and that Tuter did have a twelve-year old son. As in *Danhauer*, however, Agent Magalassi only corroborated innocent, innocuous information about the Tuter's appearance, residence, cars and child. Almost anyone can describe the residents of, and vehicles at, a particular home without having any

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special knowledge of what goes on inside the home. *See United States. v. Soto-Cervantes*, 138 F.3d 1319, 1323 (10th Cir.1998) ("The verification of facts readily observable to anyone on the street, without more, is insufficient to support a reasonable suspicion that criminal conduct is occurring."). As made clear in *J.L.*, an accurate description of a suspect's readily observable location and appearance does not, without more, show that "the tipster has knowledge of concealed criminal activity." 529 U.S. at 272, 120 S.Ct. 1375. "Apart from the tip, [Agent Magalassi] had no reason to suspect ... illegal conduct" and his suspicion that Tuter was making pipe bombs "arose not from [his] own observations but solely from a call made from an unknown location by an unknown caller." *Id.* at 268, 270, 120 S.Ct. 1375. The fact that Tuter had a fifteen-year old criminal history or that his wife legally possessed firearms a year ago is insufficient to corroborate the informant's claim that Tuter was making pipe bombs in his garage. *See Danhauer*, 229 F.3d at 1006.

The government contends that the informant's information was reliable because the WeTIPs intake sheet indicated that the caller's information was firsthand. Courts have recognized that, in some circumstances, firsthand observations from a confidential informant can support a finding of reliability. *See Gates*, 462 U.S. at 234, 103 S.Ct. 2317 (the informant's "explicit *1298 and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles the tip to greater weight than might otherwise be the case"). Here, however, the statement that the caller's information was firsthand is completely unsubstantiated. The caller did not claim to have ever been inside the Tuter's home or garage or to have seen the pipe bombs or firearms. The statement that the caller's information was firsthand was simply a conclusory notation on the intake form, and gave no supporting explanation of the caller's basis of knowledge. Moreover, the caller did not

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provide the kind of highly specific or personal details from which one could reasonably infer that the caller had firsthand knowledge about the claimed criminal activity. *Cf. United States v. Taylor*, 985 F.2d 3, 6 (1st Cir.1993) (noting that affidavit may support informant's veracity "through the very specificity and detail with which it relates the informant's first-hand description of the place to be searched or the items to be seized").

The government also suggests that because the tipster alleged that Tuter was manufacturing explosives in Oklahoma on the eve of the millennium, a relaxed showing of reliability should be permitted because of the risk of imminent danger to the public. The Supreme Court in *J.L.* did state in dicta the possibility of such a relaxed standard in the case of information suggesting imminent mass destruction. The Court explained:

> The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk.

Id. at 273-74, 120 S.Ct. 1375.

The government contends that the caller's report of Tuter "making pipe bombs" presents just such a circumstance. We do not believe, however, that an uncorroborated report of someone "making" a pipe bomb in his or her garage carries with it quite the same sense of urgency and risk of imminent danger as is present in a report that someone is "carrying" a bomb. More importantly, Agent Magalassi said nothing in his supporting affidavit about an exigent or emergency situation or about an increased risk to the public because of the upcoming millennium, necessitating either a need to act urgently or a need to relax the usual probable

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cause standards, and the affidavit contains no information about any intended use of such pipe bombs. *See* *Aguilar v. Texas*, 378 U.S. 108, 109 n. 1, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) ("It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention."), *overruled on other grounds*, *Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527.

We conclude, therefore, that the district court correctly held that the facts set forth in the affidavit fell short of providing probable cause for a search warrant. The minimal corroboration of innocent, readily observable facts was insufficient to establish the veracity or reliability of the caller or to link Tuter with the allegation that he was making pipe bombs in his garage.

II. LEON GOOD FAITH EXCEPTION

[4] Although the search warrant was not supported by probable cause, we conclude that the evidence seized at Tuter's residence need not be suppressed because of the good faith exception to the exclusionary rule set forth in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). In *Leon*, the Supreme Court held that the purpose of the exclusionary rule is to deter police misconduct, *id.* at 916, 104 S.Ct. 3405, and that "the suppression of evidence obtained pursuant to a warrant should be ordered ... ***1299** only in those unusual cases in which exclusion will further the purposes of the exclusionary rule," *id.* at 918, 104 S.Ct. 3405. "Where an officer acting with objective good faith obtains a search warrant from a detached and neutral magistrate and the executing officers act within its scope, there is nothing to deter." *United States v. Nolan*, 199 F.3d 1180, 1184 (10th Cir.1999). (citing *Leon*, 468 U.S. at 920-21, 104 S.Ct. 3405).

"The Supreme Court recognizes four situations in which an officer would not have reasonable grounds for believing a warrant was properly issued. In these situations, the good-faith exception to the exclusionary rule would not apply."

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Danhauer, 229 F.3d at 1007 (citation omitted).

> First, evidence should be suppressed if the issuing magistrate was misled by an affidavit containing false information or information that the affiant would have known was false if not for his reckless disregard of the truth. Second, the exception does not apply when the issuing magistrate wholly abandons [his] judicial role. Third, the good-faith exception does not apply when the affidavit in support of the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Fourth, the exception does not apply when a warrant is so facially deficient that the executing officer could not reasonably believe it was valid.

Id. (citations and quotations omitted).

[5] The district court denied application of the good-faith exception, stating only that Agent Magalassi's affidavit was insufficient to justify the issuance of the warrant. The applicability of *Leon's* good faith exception is a question of law that we review de novo. *United States v. Rowland*, 145 F.3d 1194, 1206 (10th Cir.1998). Applying that standard, we disagree with the district court's conclusion that the good faith exception does not apply.

Tuter contends that the first and third exceptions listed above are applicable here to preclude use of the good faith exception. We are satisfied that the first exception is not present here. Under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), if a defendant establishes that a police officer made false statements in an affidavit supporting a search warrant knowingly or with reckless disregard for the truth, and that the false statement was necessary to the finding of probable cause, the evidence seized during the resultant search must be excluded. *Id.* at 155-56, 98 S.Ct. 2674. Allegations of negligence or innocent mistake, however, are insufficient. *Id.* at 171, 98 S.Ct. 2674. The district court conducted a *Franks* hearing on the veracity of the affidavit here, and listened to

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the testimony of Agent Magalassi. After reviewing the record, we conclude that the district court did not clearly err in finding that the mistakes in the supporting affidavit were insubstantial and did not contribute to the magistrate judge's finding of probable cause, and that nothing in his testimony would show that Agent Magalassi deliberately lied or recklessly disregarded the truth.

We are also satisfied that the third exception does not preclude application of *Leon*. At the time the underlying affidavit was prepared and the warrant was issued, neither the Supreme Court's *J.L.* decision nor this court's *Danhauer* decision had been issued. Agent Magalassi thus had reason to believe that corroboration of innocent facts, coupled with his investigation leading to discovery of Tuter's criminal history, would be sufficient to establish probable cause. *See Gates*, 462 U.S. at 244 n. 13, 103 S.Ct. 2317 ("[I]nnocent behavior frequently will provide the basis for a showing of probable cause" and "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of non-criminal acts."). Further, Agent Magalassi testified that he contacted an attorney in the U.S. Attorney's office who told him he had sufficient ***1300** probable cause. *See* Appellant's App. at 153.

"Just as reviewing courts give 'great deference' to the decisions of judicial officers who make probable-cause determinations, police officers should be entitled to rely upon the probable-cause determination of a neutral magistrate when defending an attack on their good faith for either seeking or executing a warrant." *United States v. Corral-Corral*, 899 F.2d 927, 939 (10th Cir.1990).

> In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination.... Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law. Penalizing the officer for the magistrate's error, rather than his own, cannot

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logically contribute to the deterrence of Fourth Amendment violations. *Leon*, 468 U.S. at 921, 104 S.Ct. 3405 (quotations, citations and internal brackets omitted).

We conclude it was not unreasonable for Agent Magalassi and the ATF agents to rely on the magistrate judge's authorization of the warrant. *See United States v. Cardall*, 773 F.2d 1128, 1133 (10th Cir.1985) (stating that in considering the *Leon* good-faith principles, "it must ... be remembered that the knowledge and understanding of law enforcement officers and their appreciation for constitutional intricacies are not to be judged by the standards applicable to lawyers"); *see also Leon*, 468 U.S. at 919, 104 S.Ct. 3405 ("If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." (quotations omitted)).

Although we have determined that the supporting affidavit did not establish probable cause, we cannot say it was so facially insufficient under the state of law at the time he obtained the warrant that Agent Magalassi should have known the search was illegal despite the magistrate's authorization. *See id.* at 922 n. 23, 104 S.Ct. 3405; *Danhauer*, 229 F.3d at 1007 ("The absence of information establishing the informant's reliability or basis of knowledge does not necessarily preclude an officer from manifesting a reasonable belief that the warrant was properly issued, particularly when the officer takes steps to investigate the informant's allegation."). At the time Agent Magalassi obtained the search warrant, he reasonably believed the fruits of his investigation provided sufficient corroboration of the information provided by the anonymous caller to WeTIP to establish probable cause.

Accordingly, the judgment

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of the United States District Court for the Northern District of Oklahoma is REVERSED and REMANDED for further proceedings consistent with this opinion.

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v. No. 00-5086

CHRISTOPHER SHAWN TUTER,

Defendant-Appellee.

ORDER
Filed March 29, 2001

Before **EBEL**, **KELLY** and **LUCERO**, Circuit Judges.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed.R.App.P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of the Court

s/
Deputy Court